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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 RONALD BRITT,

4 Plaintiff,

5 v.

13 CV 8289 (KPF)

6 THERMALD REALTY I, L.P., et
7 al.,

8 Defendants.

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9 New York, N.Y.
10 October 2, 2014
3:35 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 GREGORY KOERNER
16 Attorney for Plaintiff

17 GOULD & BERG LLP
18 Attorneys for Defendant Thermal
19 BY: JANE BILUS GOULD

20 KAUFMAN DOLOWICH & VOLUCK, LLP
21 Attorneys for Defendant Wavecrest
22 BY: JEFFREY ETTINGER
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1 (Case called)

2 THE COURT: We are here today for several things. I
3 have received what I believe to be two different motion
4 applications, and you'll tell me if I'm missing anything.

5 There was an application by Mr. Koerner to amend his
6 complaint to add a particular claim to it, and I have
7 Ms. Gould's response to that.

8 Additionally, I think I have a request on the part of
9 Mr. Ettenger to move for summary judgment regarding Wavecrest.

10 Am I correct, sir?

11 MR. ETTENGER: Yes, your Honor.

12 THE COURT: And, Mr. Koerner, did you get that
13 particular application?

14 MR. KOERNER: I did.

15 THE COURT: Did you respond to it, sir?

16 MR. KOERNER: I did not.

17 THE COURT: So we'll start talking about that today.

18 MS. GOULD: Your Honor, I also submitted a letter
19 requesting to move for summary judgment on behalf of my clients
20 on August 21.

21 THE COURT: Okay. Let me see. I want to look at your
22 letter for a moment then because was your respond folded into
23 that?

24 MS. GOULD: No.

25 MR. KOERNER: I don't recall getting that letter.

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1 THE COURT: That one I'm not sure I received.
2 Ms. Gould, please excuse me. So let me look at the docket
3 sheet. I pulled off a number of documents and I want to make
4 sure.

5 I have a letter response from Ms. Gould dated the 21st
6 of August. And then the next thing I have on the 21st is a
7 letter from Mr. Koerner. And then I have something from
8 Mr. Ettenger that's dated the 26th of August. So I actually
9 don't have it in ECF.

10 MS. GOULD: Well, I don't have the ECF copy. On my
11 letter it says via email and ECF. If it wasn't ECF, it's our
12 office's fault. But I can hand a copy up to you.

13 THE COURT: Sure. Do you also have a copy to show to
14 Mr. Koerner?

15 MS. GOULD: I actually don't.

16 MR. ETTENGER: Your Honor, I have a copy which I would
17 be happy to give to Mr. Koerner. I don't actually need that
18 for now.

19 THE COURT: So let me ask the parties to wait a moment
20 so I can read Ms. Gould's letter as well. Thank you very much.

21 Ms. Gould, this is what I have. So it begins as a
22 response to Mr. Koerner's application to amend. And it ends by
23 saying I think -- and I'm being a little bit summary here --
24 that even if you let it happen, you should consider its
25 futility because we're going to win on our summary judgment

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1 motion.

2 So this is the one letter that I have seen. And,
3 Mr. Koerner, you'll tell me if this is the one letter you've
4 seen as well.

5 MR. KOERNER: That's right.

6 THE COURT: Okay.

7 MS. GOULD: And then I responded to Mr. Ettenger's
8 letter.

9 THE COURT: None of us have that. Mr. Lopez, could
10 you please take that from Ms. Gould. Let's do an exchange,
11 please. I'll give this one back. Thank you very much.

12 Mr. Ettenger, did you bring a copy of her other
13 letter?

14 MR. ETTENGER: I just gave Mr. Koerner whatever I have
15 in my file today from Ms. Gould. Sorry.

16 MS. GOULD: That related to Mr. Ettenger's summary
17 judgment motion on cross claim.

18 THE COURT: I see. Okay. All right. Mr. Lopez, not
19 to make you run around the courtroom today, if you could show
20 that to Mr. Koerner and then it can go back to Ms. Gould.

21 Can I ask, Ms. Gould, when you go back to your office
22 today, have it refiled. If nothing else, email it to us and
23 we'll docket it because it's not on ECF and I'm looking at ECF
24 right now.

25 MS. GOULD: Yes, your Honor. But actually there

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1 was -- I have a different motion that relates to summary
2 judgment claim. A different letter, I'm sorry. Let me just
3 give it up to you now.

4 MR. ETTENGER: I believe that's the letter I just
5 handed to Mr. Koerner.

6 THE COURT: Thank you.

7 MR. ETTENGER: I will make sure that gets docketed.

8 THE COURT: Whichever of these I should have had
9 please have docketed. Okay. All right.

10 Why don't we begin with the motion with which I have
11 some familiarity which is the application to amend the
12 complaint. So, Mr. Koerner, let me talk to you. What I want
13 to do, sir, is I just want to as I'm speaking with you pull up
14 your letter to me because I had looked at that right before I
15 came on the bench. All right.

16 Go ahead, please, sir, anything you want to add to
17 that.

18 MR. KOERNER: There's not really much I want to add to
19 the letter. I will say from the outset any mistake that was
20 made as far as not including these causes of action, it's my
21 mistake. It's law firm error. I've said from the outset I
22 don't do a whole lot of sexual harassment cases or
23 discrimination cases. It's my fault, my bad. I don't think
24 Mr. Britt should be penalized for it.

25 Certainly, the defendants have been on notice of these

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1 claims and the exact nature of these claims from the outset. I
2 haven't tried to hide the nature of the claims or the
3 allegations, and I don't see how any prejudice would result
4 from the amendment of the complaint at this point.

5 THE COURT: All right. But let me ask you this
6 question, sir. Typically when I'm asked to approve an
7 application to amend, we're at the stage where it's covered by
8 Rule 15, which is a rather liberal standard and indicates that
9 leave should be granted unless something horrible is going to
10 happen. And so the standard there for Rule 15 analysis tends
11 to be focused on prejudice to the defendants, and I understand
12 that's why you're telling me now you don't think there is much
13 prejudice to the defendants.

14 I think Ms. Gould is correct that because of the
15 operation of the case management plan and because there is that
16 provision on the first page of the case management plan that
17 says that amendments to the pleadings must be done within a
18 certain period of time -- and in this case actually it was 60
19 days, which is much nicer than I usually am -- that once that
20 happens and once you've gone beyond that period, it is on in
21 this case, you, sir, to prove good cause. And so what she's
22 saying is that your perhaps unfamiliarity with New York City
23 statutes does not suffice under the law as good cause.

24 And so let me back up first and ask you, do you agree,
25 sir, that at this stage what I'm supposed to look at are two

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1 things: the Rule 15 standard and the Rule 16 standard?

2 MR. KOERNER: I agree with that.

3 THE COURT: Okay. And so really the question for me
4 is one of good cause. And also, I suppose, bound up in that is
5 considerations of prejudice.

6 MR. KOERNER: Correct. And part of the analysis here,
7 I think, in the life of this litigation I've bent over every
8 which way to try to resolve this at the outset. I was told
9 throughout the litigation that, look, yes, we're going to
10 recommend settlement in this case. We have to go through all
11 of the discovery.

12 THE COURT: I'm going to stop you, sir. I'm not sure
13 I'm supposed to hear that.

14 MR. KOERNER: Okay. In any event, we were in a
15 situation where we were pursuing resolution of this in good
16 faith. And then we've come in and basically there's a no-pay
17 position on the part of the defendants, and now there's these
18 motions to dismiss all the claims which I have pled.

19 So what we're looking at here is a situation where if
20 I'm not allowed to amend the complaint and they're successful
21 on their motions to dismiss various claims they've indicated
22 they're going to make, we're left with a situation where a
23 litigant is going to be denied his day in court. And if that's
24 what the judge is going to determine, then I'll have to decide
25 whether he's going to appeal or not. There's nothing -- it's

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1 my fault. It's not Mr. Britt's fault. Whether that's good
2 cause or not there's been no -- I think that there is good
3 cause.

4 I was trying to resolve this case. I went through the
5 discovery process and cooperated with all their demands and was
6 told that we would resolve this. And my client's position has
7 always been we'll basically resolve this at whatever a
8 reasonable third party will tell us. And unfortunately --

9 THE COURT: I'm sorry, I missed what you just said.
10 Something about whose clients?

11 MR. KOERNER: My client, Mr. Britt, has said we will
12 settle this case at whatever a reasonable third party will tell
13 us, whether it be a magistrate judge, arbitrator or mediator,
14 your Honor, if we have to take this to trial. I was laboring
15 under the impression throughout this litigation after spending
16 however many thousands of dollars that we were going to finish
17 discovery, we were going into the magistrate and we would
18 conduct a good faith settlement negotiation and, in fact, no,
19 it's zero.

20 So at that point I have to really -- it's on me. I
21 understand that, your Honor. But at that point I said, wow, I
22 really need to amend this complaint because they're going to be
23 making these motions to dismiss the cause of action I have
24 pled. So I immediately alerted the Court that I'm making the
25 request to amend the complaint as soon as I was aware of it.

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1 THE COURT: As soon as you were aware of what?

2 MR. KOERNER: As soon as I was aware of their pending
3 motions to dismiss or summary judgment, rather, as opposed to
4 what their stated intent was to try to resolve this via third
5 party mediation.

6 THE COURT: And see, Mr. Koerner, that was something
7 that I was puzzled with in your letter, and I might ask still
8 for a bit more clarification. When what you said is I had
9 hoped for progress towards a settlement, however, defendants
10 have maintained a no-pay position, I understood you to be
11 saying that somehow they should be penalized for refusing to
12 settle the case. That's not in fact what you're saying.

13 MR. KOERNER: No. I'm sorry if I was unclear.

14 THE COURT: Remember, I don't know and I'm not sure I
15 should know the progress of the parties' settlement
16 discussions. I thought there are rules of evidence about that
17 kind of stuff. It doesn't go to the jury. I'm not sure how
18 what you guys are doing operates as some sort of estoppel.

19 MR. KOERNER: It's not estoppel, your Honor. I think
20 it's really the interest of justice. We have claims here that
21 are well established. Discovery has borne out my client has
22 his version of events; their client doesn't remember what
23 happened. You know, we have valid claims here. And the fact
24 that there may be weaknesses in my complaint, the factual
25 allegations are all in there. There's no prejudice. I think

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1 as far as the good cause, I think there's good cause to allow
2 the amendment of the complaint.

3 THE COURT: Sir, let me talk to you a little bit more
4 about good cause. Are you suggesting that you were prevented
5 from filing an application to amend the complaint because of
6 something the defendants did or said?

7 MR. KOERNER: Absolutely not. Well, I certainly, if I
8 had known that they were going to, contrary to what they said,
9 specifically that they were going to take a no-pay position and
10 that they were going to be making summary judgment motions on
11 the claims, then I mean it wouldn't prevent me. But that was
12 the circumstances that led up to my having to request an
13 amendment at this late date.

14 THE COURT: Okay. But, Mr. Koerner, your letter also
15 says that the reason you're seeking amendment at this time was
16 because you did not initially understand that this was a claim
17 that you could plead. And I don't understand the
18 relationship -- and maybe there is no relationship -- between
19 your knowledge of New York City law and these settlement
20 discussions.

21 MR. KOERNER: No, there's not really a relationship
22 there.

23 THE COURT: Okay. When did you know that you had a
24 claim under New York City law?

25 MR. KOERNER: When they started saying that they're

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1 going to make these motions for summary judgment and that
2 because I don't have the city law claim -- I think it was
3 actually the magistrate judge who said you don't have the city
4 law claims pleaded in your complaint and the judge might not
5 allow you to amend at this late date, so you should really
6 settle.

7 MR. ETTINGER: Judge, if I may, I apologize. I can
8 clear this up. Mr. Koerner wrote a letter to us I think two or
9 three days before the mediation requesting permission to amend
10 and then we went to the mediation.

11 THE COURT: I'm sorry. When was the mediation, sir?

12 MS. GOULD: August 15.

13 MR. ETTINGER: So the day before the mediation he
14 wrote us a letter indicating that he wanted to amend for New
15 York City claims. We went to the mediation. Obviously, it did
16 not settle. And thereafter we wrote the letters to the Court
17 requesting this conference, and Mr. Koerner wrote a letter
18 requesting to make a motion to amend.

19 So it wasn't like we went to the mediation and then
20 after mediation he realized that he had this claim or the
21 magistrate told him that. He obviously found that out before
22 the mediation but only wrote to the Court after it didn't
23 settle. So I just wanted to clear that issue up, not that it's
24 relevant.

25 THE COURT: I'm just wondering how it cuts, sir,

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1 because I suppose the argument could be made that if he didn't
2 know about the claim until after the mediation, that's an
3 awfully long period of time. It's a question of what is
4 worse -- knowing the claim and sitting on it for months and
5 months and months or not knowing about it until very recently.
6 But I understand your point. Let me hear from him and then
7 I'll let each of you speak.

8 So, Mr. Koerner, please continue.

9 MR. KOERNER: Certainly the urgency of including the
10 city law claims was fully realized by me at the mediation.
11 That's when I fully realized it.

12 THE COURT: I think it's safe to say, sir, that at the
13 time you filed the complaint in this case, which I realize is
14 the second complaint in this particular set of events, you were
15 unaware.

16 MR. KOERNER: Correct.

17 THE COURT: And when did you know?

18 MR. KOERNER: I became aware of it, I thought it was
19 at the mediation. If it wasn't, it was leading up to the
20 mediation. Whether it was something that opposing counsel had
21 said that there would be a motion for summary judgment and -- I
22 can't remember exactly how I became aware of it, but certainly
23 at the mediation is when, you know, the magistrate judge
24 impressed upon me that this was a serious problem and that you
25 may not be allowing me to amend the complaint.

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1 THE COURT: Okay. I'm going to hear from them. But
2 it is your motion; I'll let you speak last.

3 So, Ms. Gould, Mr. Ettenger, whoever wishes to speak
4 to this first.

5 MR. ETTENGER: Your Honor, I think you pinpointed it.
6 Mr. Koerner has acknowledged the issue and the issue really is
7 is law office failure good cause regarding the case management
8 order. And he's going to have to make that motion and put in
9 relevant case law as to what good cause is.

10 THE COURT: I'm stopping you now because this is the
11 motion, is it not? It's styled to me as plaintiff's letter
12 motion for leave to file an amended complaint. This is the
13 motion. There's nothing else.

14 MR. ETTENGER: My understanding is this was a
15 premotion conference regarding motions.

16 THE COURT: On your summary judgment motions.

17 MR. ETTENGER: Well, Judge, then the bottom line is
18 law office failure is not good cause. If it was, in every case
19 where there was an issue on a case management order regarding
20 amendment, the attorney would simply say I didn't know and then
21 the Rule 16 would be irrelevant and then they would be
22 permitted to amend and they would never have an issue.

23 So, unfortunately, in this case, he did make the
24 error. His client chooses his own counsel; he's going to have
25 to live with it. And if you disagree, you disagree, but that

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1 is what the law states.

2 THE COURT: Okay. What am I to do. I think I
3 understand better what he's saying which is he's not saying you
4 guys estopped him or enticed him or cajoled him into not
5 bringing the claim. He is saying, however, that you told him
6 all along that there was going to be a settlement.

7 MR. ETTINGER: Your Honor, we were actually in fact
8 here at the initial discovery conference where Mr. Koerner
9 wanted to have a conference and Ms. Gould said I'm not going to
10 a settlement conference. We agreed after discovery we would
11 revisit the issue. After discovery, we agreed to try to use
12 the services of the magistrate. In fact, we had individual
13 lengthy discussions with the magistrate about settlement. And
14 the magistrate said I'm not optimistic, but let's come in and
15 we'll give it a shot. The magistrate worked hard.
16 Unfortunately, there was not a meeting of the minds regarding
17 settlement.

18 But no promises were made we were going to settle or
19 an offer was going to be made. And it is regrettable that we
20 went to a mediation and there wasn't an offer made, which I
21 can't get into the specifics of why. It's not relevant to my
22 client, but there are issues.

23 But the reality is one has nothing to do with the
24 other. We litigated the case. We went through discovery. We
25 went through a mediation. It failed. Thereafter, we wrote our

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1 motions to the Court requesting summary judgment and
2 Mr. Koerner asked to amend his pleading. One should have
3 nothing to do with the other. He was never led to believe that
4 we were going to settle and, therefore, he didn't have to take
5 the necessary steps to protect his pleadings. It's just not
6 the case.

7 THE COURT: I think what he's saying is that this is a
8 case where justice calls out for this amendment to be allowed
9 because he might have done it sooner. I'm going to let him
10 speak last. He'll tell me what I'm misperceiving. I don't
11 think he's saying that you guys actively misled him. I think
12 he's just saying he had an understanding; that understanding
13 was not borne out.

14 MR. ETTINGER: I think what happened, Judge, is that
15 he found out through whatever third party means on August 13 or
16 14 that he did not properly plead a cause of action. And as
17 soon as he found that out, he notified the parties and asked
18 for permission to amend, which we said no. And then within a
19 week we had a mediation, it didn't settle, and he went to the
20 Court and requested leave to amend. It's not like he found out
21 six months ago but chose not to notify the Court. He didn't
22 find out until August, which is beyond the date set in the case
23 management order. I don't believe that's in dispute.

24 I don't believe good cause and the interest of justice
25 are the same thing. There is a standard for good cause, and

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1 law office failure does not meet that standard.

2 THE COURT: Okay. Ms. Gould, do you have anything you
3 wish to add?

4 MS. GOULD: Not much except I feel I need to go on the
5 record that there was -- I know you've said that Mr. Koerner is
6 not saying that we led him on. But the reality is there was
7 never a point in time when I on behalf of my client made any
8 promise to Mr. Koerner. There was never a point in time -- and
9 Mr. Ettenger is correct. We were here for the Rule 16
10 conference. We had to fill in the little blanks about
11 settlement discussions. You asked those questions. And at
12 that time I said we needed to go through discovery. We needed
13 to see what his case was about.

14 But I never had authority to tell him that there would
15 be a settlement. I wouldn't do it unless I had authority to do
16 that. I was hopeful -- because I wouldn't have taken Judge
17 Freeman's time and counsel's time and my time -- that a
18 resolution could be had, not because I think there's a great
19 case on plaintiff's side, but because the vicissitudes of
20 litigation are what they are and I know what they are. So I
21 was hopeful that with Judge Freeman's auspices that perhaps
22 some resolution could be achieved. It wasn't.

23 The letter regarding the amendment was written on the
24 eve of the mediation. We discussed it at the mediation. So it
25 was out there at that time. When he became aware of that

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1 before, I don't know.

2 THE COURT: Okay.

3 MS. GOULD: I have other reasons why I don't think he
4 should be permitted to amend which I also addressed in my
5 letter --

6 THE COURT: Which I have on the screen right now.

7 MS. GOULD: -- which is futility. No. 1, he's seeking
8 leave to amend and add two claims. One is the violation of New
9 York City Human Rights Law, which we've discussed; I want to go
10 back to for a second. The other is a state law claim of
11 assault. And as I set forth in my letter, I directly asked --
12 I know what the record is and the record is that there was no
13 physical anything between his client and Ms. Alderman after the
14 year 2007.

15 THE COURT: Okay. I just wanted to be clear. I
16 understand there to have been a fair amount of contact before
17 that, but yes.

18 MS. GOULD: Not a fair amount -- two occasions of
19 three sexually related activities, for lack of a better word.
20 But under New York law, there's a statute of limitations for
21 assault and that's one year. So I don't see how he could be
22 permitted to add that claim today in 2014. To me that's
23 futile.

24 I also indicated to the Court with regard to the claim
25 under the Human Rights Law, and it depends on how the Court

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1 wants to deal with that, that the Human Rights Law defines an
2 employer as four or more employees in the same way that the New
3 York State Human Rights Law defines that. And we believe that
4 both with respect to the L.P., Thermald, and with respect to
5 our client, Doreen Alderman, that the payroll records will
6 establish that neither one had four or more employees during
7 the relevant time frame.

8 THE COURT: Ms. Gould, let me stop you for a moment,
9 please. Ms. Alderman, did she have any employees?

10 MS. GOULD: No. She's a principal of the partnership.

11 THE COURT: Okay.

12 MS. GOULD: I don't want to suggest anything, but
13 she's a principal of the partnership.

14 THE COURT: And realize, please, that I do not have
15 the deposition transcripts that you all have.

16 MS. GOULD: Oh, yes.

17 THE COURT: On the issue of futility, I don't feel
18 comfortable even really opining.

19 MS. GOULD: I understand.

20 THE COURT: While I'd love to take counsel's say-so on
21 either side, I cannot. But I do want to understand the
22 argument. So Ms. Alderman by your accounting has no employees.

23 MS. GOULD: She has no employees. I don't feel
24 comfortable putting out there -- there are lots of theories
25 under state law that one could bring someone in. I don't think

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1 I need to be sharing my thoughts about that. But my position
2 is she has no employees.

3 THE COURT: I just want your position.

4 MS. GOULD: That's my position.

5 THE COURT: And what is Thermal's position on number
6 of employees it had during the relevant time period?

7 MS. GOULD: The issue is, and I'm an officer of the
8 court so I'm putting it out there on the record, that unlike
9 federal law, which talks about, whatever, 15 or more employees,
10 for each working day of 20 weeks in this or the prior year,
11 under New York law, there is nothing that defines the relevant
12 time frame. And I've done the research under New York City
13 Human Rights Law. Maybe I'll come upon something; so far I
14 haven't seen it.

15 But if, as many courts, including this Court, has
16 said, if the New York State law is analyzed in the same way as
17 federal law, then by that definition, and it's taken some work
18 because payroll records are not always as straightforward as
19 you think are, but I believe and I will establish that there
20 was no year, going as broad as from 2007 to 2013 when Mr. Britt
21 was terminated, that there's no year in which there were 20
22 weeks in which every day of those 20 weeks there were four or
23 more employees of Thermal. I would be able to establish that.
24 So that was my position and I take that position vis-a-vis
25 Section 296. And I would take that position if the Court were

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1 going to be allowing the amendment under the Human Rights Law.

2 THE COURT: I understand that. Before you sit down
3 let me ask you this. I do want to hear from Mr. Koerner
4 because it is his application and he gets to speak last. But
5 on this issue and on the summary judgment issue we're going to
6 talk about in a few minutes, I'm going to tell you something
7 that you all already know. It costs money to file motions.

8 MS. GOULD: We know that.

9 THE COURT: And your clients would prefer to spend the
10 money on you than on settlement? That's their prerogative. I
11 just want to know.

12 MS. GOULD: I'm not all that comfortable having this
13 conversation on the record. But the answer is that you can see
14 how old I look. I've been practicing law for 40 years. I know
15 how expensive litigation is -- and it's a public record so I
16 can say it -- I know how expensive litigation is. And I can
17 certainly tell the Court that I'd like to think of myself as a
18 responsible attorney, and all of that information has been
19 imparted responsibly to my client. And the answer is yes, at
20 this point in time that is her preference. And the reason is
21 very simple from her point of view, and I'm sure she wishes she
22 were here to tell you herself.

23 THE COURT: I don't need to know.

24 MS. GOULD: The reason is she doesn't believe she did
25 anything wrong and that's her position.

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1 THE COURT: Okay. That's fine. I have people who
2 have stood on principles and spent an awful lot of money and
3 been vindicated and folks who have lost and you have as well.
4 That's fine. I just want to know before we embark on a
5 continuation of these adventures together that I got my
6 thoughts out there.

7 MS. GOULD: Thank you.

8 THE COURT: That is the answer.

9 Mr. Koerner, let me hear from you.

10 MR. KOERNER: The one other thing I would just say is
11 when Ms. Gould and Mr. Ettenger were saying there was never any
12 promise of a settlement, that's true. However, there were
13 multiple occasions where I had a conversation with you where
14 you said, look, let's go through these depositions and we'll
15 have a third party settle this thing. And the same thing when
16 you told me, Ms. Gould, where you said my client is taking a
17 no-pay position against my advice. So I'll just say that.

18 THE COURT: Hang on one second. On the first part I
19 guess the commitment sounds like a commitment to revisit things
20 at the end of discovery, which is what people do all the time
21 which is not a commitment to settle, although, yes, you're
22 saying that last point.

23 I suspect his statement -- and we'll settle this
24 thing -- is more aspirational than an actual promise and I
25 don't believe you took it as such.

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1 The way you just described what Ms. Gould has said,
2 she was unable, is unable to persuade her client to settle --

3 MR. KOERNER: And the other thing is at this point.
4 It's not like at this point is different. It's throughout this
5 entire period it's been zero.

6 THE COURT: Sir, I'm sorry, but how then were you
7 thinking that you were going to be able to settle with her
8 client? Listen, the first conference in this case was in the
9 robing room here. She was fairly adamant that this was going
10 to have to be resolved by a trial. So I'm not sure -- and,
11 again, maybe I don't need to hear the specifics, but I'm not
12 sure what in your dealings with counsel led you to believe that
13 the Alderman/Thermal half could be settled.

14 MR. KOERNER: I was led to believe that. But you're
15 right, it's not really pertinent to this other than the fact
16 that I do think the interests of justice do come into play here
17 as far as good cause, as far as, again, as I've said before,
18 there's no prejudice here. The discovery record, which I know
19 you're not privy to, establishes that the claims that should
20 have been pled were not.

21 I made my application for an amendment. I don't see
22 how it's going to entail any additional expense or work for the
23 defendants. They want a trial, so let's have a trial on the
24 valid claims that belong as part of this case.

25 THE COURT: Okay. Mr. Koerner, I said I was going to

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1 let you speak last, but you just raised a question I want to
2 ask of either Ms. Gould or Mr. Ettenger.

3 I want to understand what prejudice you identify here
4 specifically. Is prejudice as the case law defines it the need
5 for continued discovery, the need for the reopening of
6 discovery? Is prejudice the fact your summary judgment motion
7 will now have five parts to it or six parts to it rather than
8 four? I would just like to understand are you taking the
9 position, counsel, that there is prejudice to your clients,
10 and, if so, what do you identify the prejudice is, or are you
11 simply saying that Mr. Koerner has not established good cause
12 and that I need not undertake the prejudice analysis?

13 MS. GOULD: The latter. And I'm an officer of the
14 court so I understand what the law talks about in terms of
15 prejudice. And, no, I'm not suggesting that we need to reopen
16 discovery. Discovery has been had. The facts, the same facts
17 of which Mr. Koerner was aware on day one are now, if he is
18 permitted to amend, going to be the facts upon which that
19 additional claim or claims would be based. And so I don't
20 identify prejudice.

21 My reading of the law as an officer the court is that
22 notwithstanding that the city Human Rights Law provides for
23 different forms of relief, including punitive damages,
24 including attorneys' fees, which are not provided by the New
25 York State Human Rights Law, that the case law suggests that

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1 that in and of itself is not prejudice. And I have to put that
2 out there because that's my reading of the cases.

3 I'm suggesting and I think Mr. Ettenger has suggested
4 that the Court should be looking at Rule 16 in addition to Rule
5 15, of course, but that Mr. Koerner simply has not established
6 good cause and that that is the analysis that the Court should
7 engage in at this point in time and he's clearly under settled
8 case law not established good cause.

9 THE COURT: Okay. Mr. Ettenger.

10 MR. ETTENGER: I don't need to address that issue.
11 Because we are on the record, I believe I need to address two
12 issues briefly. One is at no point did I ever say nor could I
13 say we will settle this case after discovery. I certainly
14 could not because I'm a bit player.

15 THE COURT: I'm not worried about that.

16 MR. ETTENGER: The second issue is because it is on
17 the record -- there's a proceeding -- that any discussion
18 regarding settlement has to be stricken because these are all
19 prejudicial if the case proceeds in any manner. They shouldn't
20 be part of the record.

21 THE COURT: Let me understand what you mean by that,
22 sir. I'm not striking it. I've heard it. It's on the record.
23 This is not coming out at trial if there is a trial in this
24 case.

25 MR. ETTENGER: That's all I need to say then.

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1 THE COURT: I don't think anybody but the folks in
2 this room are going to pay attention to this transcript.

3 MR. ETTENGER: Good. That's all I needed to say.

4 MS. GOULD: And one more sentence, your Honor, and I
5 don't want to beat the dead horse, but the issue, I've never
6 reported to Mr. Koerner that my client is refusing to take my
7 advice to settle. That is never what I said to him. That's
8 all.

9 THE COURT: That's fine. And, Mr. Koerner, again, it
10 is your application. I do want to give you the last word, sir.

11 MR. KOERNER: Thank you, your Honor. I have nothing
12 further.

13 THE COURT: Okay. Thank you. Let me go off the
14 record for a second.

15 (Pause)

16 THE COURT: All right. Thank you very much for your
17 patience, and thank you for very thoughtful oral argument
18 today.

19 I'm not going to allow the amendment of the complaint
20 because this is governed by Rule 15 and Rule 16. There is a
21 showing or a requirement of good cause, and I just don't think
22 it's been shown here.

23 What I understand is that sometime after the 60 days
24 that were specified in the case management plan, you realized
25 that you had this complaint and wanted to bring it. I don't

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1 see that there was any active or even passive misleading by
2 defense counsel that caused you not to bring it. And I think
3 it is too late in the day. It's seven months after the case
4 management plan was filed. So, I will not allow it.

5 I am thoughtful of and have thought about the cases on
6 pages 3 and 4 of Ms. Gould's letter to me regarding Rule 16 and
7 attorney oversight. I'm not getting into the futility issue.
8 I don't think it's appropriate for me to do that. So I can't
9 say whether it's futile or not because I don't have the
10 transcript and I certainly don't have in front of me the
11 payroll records and the relevant legal standards to decide
12 whether or not those particular thresholds have been met. So
13 it is unfortunate, but that is in fact what the law provides.
14 I'm not going to vary from it.

15 Let me then understand, the next step is the summary
16 judgment motions. So at that point it is now defense counsel
17 who are bringing the motions. So we're here. My next case is
18 outside in the hallway. Let me hear from you about what you
19 believe, other than the written stuff that I've seen, if there
20 is anything you want to call to my attention about these
21 summary judgment applications.

22 Mr. Ettenger.

23 MR. ETTENGER: I will stand by my written letter
24 unless you have any questions for me, your Honor.

25 THE COURT: I do not, sir.

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1 I want to understand, Ms. Gould, are you arguing that
2 his motion actually doesn't work? I saw some letter --

3 MS. GOULD: I'm arguing -- we have cross claims
4 against each other. There's a property management agreement.
5 His client is still managing my client's property, but there's
6 a property management agreement. And it's my read of the
7 agreement that while my client, if it's determined there are
8 FLSA claims here and New York State Labor Law overtime claims
9 here, if it were to be determined that our client actually
10 improperly paid Mr. Britt, even though his client took care of
11 the payment, they might be liable for the payment itself. And
12 my position is that if that happens, that there was willfulness
13 and gross negligence and that any liquidated damages, any
14 penalty, any attorneys' fees should be their responsibility.

15 So my argument is there's going to be a question of
16 fact on the provisions -- until we have a determination,
17 there's going to be a question of fact as to whether that
18 failure on their part was gross negligence or willful. And so,
19 therefore, I don't see the motion.

20 THE COURT: All right. But this is interesting
21 because I have not yet had a case where the parties on the same
22 side of the "V" are fighting with each other. So you'll be
23 moving for summary judgment with respect to?

24 MS. GOULD: I wasn't going to be moving. He's moving
25 and I'm opposing.

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1 THE COURT: You're not moving at all on behalf of your
2 client.

3 MR. ETTENGER: No, because I think there's going to be
4 a question of fact on that issue.

5 THE COURT: So you'll be moving, Mr. Ettenger, for
6 summary judgment, and you will get two oppositions.

7 MR. ETTENGER: Well, your Honor, no. There's
8 different oppositions. I'm moving on Title 7 and executive law
9 against the plaintiff. Plaintiff will oppose that. I'm moving
10 under the FLSA against the plaintiff saying he does not meet
11 the standard to prove that he worked overtime, which the
12 plaintiff will oppose. And then I'm saying if your Honor
13 determines that he has a valid FLSA claim, I have contractual
14 indemnity from the codefendant, which they will oppose. So
15 they will oppose part three, and he will oppose parts one and
16 two. It is what it is, your Honor, but I obviously believe the
17 indemnity provision applies. Ms. Gould says if you're in,
18 you're in with me on that claim.

19 THE COURT: And, Ms. Gould, you're not moving at all
20 for summary judgment?

21 MS. GOULD: I am. Not with regard to Mr. Ettenger's
22 clients; I'm moving with regard to plaintiff.

23 THE COURT: Okay.

24 MS. GOULD: That's the letter that you don't have that
25 I just gave you a copy of on the grounds that neither of my

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1 clients is an employer under New York State law and on the
2 grounds that under New York Labor Law, a live-in, he calls
3 himself, whatever he calls a superintendent. The definition of
4 his job is he's a live-in janitor, and there's an exemption
5 under state law for overtime for that job. And I'm going to
6 move under FLSA on two grounds -- one is he can't prove when he
7 works. He claimed he worked overtime. That's his claim.

8 THE COURT: You don't mean what years. You mean in a
9 given day.

10 MS. GOULD: The statute is the statute, and he's only
11 sought relief from August of 2011 on. He hasn't gone back six
12 years under the Labor Law, and he hasn't gone back the two
13 years or three years under FLSA. We asked those questions.
14 That's what's been pled. He made a claim to the New York State
15 Department of Labor which was closed when he asserted this
16 claim.

17 THE COURT: I'm going to ask you to slow down a little
18 bit.

19 MS. GOULD: I'm sorry. And the other issue from our
20 point of view aside from the proof is that I believe there's
21 case law under the FLSA for the proposition that if there was a
22 clear mutual understanding of how someone was going to be paid,
23 then that is how someone is going to be paid. In this case
24 there was an employment agreement. And I think the letter that
25 you don't have -- we will ECF it to you later or tomorrow --

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1 indicates that everyone agrees that there was a signed
2 agreement, but no one had every page of that agreement. We
3 have a draft of that agreement.

4 But the agreement that we believe was signed that we
5 have a draft of basically says this is how you're going to be
6 paid. This is your total compensation. And he was paid
7 weekly. He was paid to do extra work, and there's no doubt
8 that he was paid to do that. And he can't prove when he did
9 work or he didn't work.

10 So I'm going to be moving on all of those grounds
11 under the FLSA as well.

12 THE COURT: Okay. Thank you.

13 Now, Mr. Koerner, for you and for me both there have
14 been some arguments made today that we were not aware of when
15 we walked into court today because I don't think you received
16 Ms. Gould's letter that she's just now been referring to. Do
17 you want to speak at this time to either Wavecrest's
18 application or to her application?

19 MR. KOERNER: They're going to make their motion. I
20 can't imagine you're not going to let them make their motion.

21 THE COURT: I sort of have to let them. I guess what
22 this experience sometimes does is it points out the
23 vulnerabilities of the motion. So I have had movants change
24 the scope of their motion in response to things that their
25 adversary has said at these conferences. You guys may just be

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1 at such loggerheads that there's nothing you can say to change
2 their minds. My purpose for this conference is because I have
3 actually been able to persuade parties to narrow or to
4 eliminate certain claims in summary judgment because they
5 realize through this discussion that they will not be viable.

6 So with respect to the issue, sir, I'm just looking at
7 Wavecrest has a view that they're only on the hook or not on
8 the hook because of this indemnity agreement. Do you have a
9 view about Wavecrest, how are they still in the case?

10 MR. KOERNER: I'm going to basically rely on
11 codefendants and say they're still in the case and also that
12 they knew or should have known that this sexual harassment was
13 going on.

14 THE COURT: Did you depose individuals from Wavecrest,
15 sir?

16 MR. KOERNER: Yes.

17 THE COURT: And were the individuals from Wavecrest,
18 to the extent you can recall the deposition testimony, were
19 they in any way aware of the nature of the relationship between
20 Ms. Alderman and your client?

21 MR. KOERNER: He denies he was aware of the
22 relationship.

23 THE COURT: I see. Did you see documents or other
24 materials indicating that he could not have been unaware of it?
25 Or I'll try and ask that question a little better.

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1 MR. KOERNER: There was testimony essentially that he
2 said when he learned that Mr. Britt was pursuing sexual
3 harassment claims, he said, oh, that makes sense. Now it all
4 makes sense that Ms. Alderman was treating you that way. So it
5 leads me to believe that, yeah, he did have some knowledge
6 about what was going on.

7 THE COURT: You're intuiting from that comment that he
8 knew all along about the relationship?

9 MR. KOERNER: That he knew that Ms. Alderman was
10 treating Mr. Britt improperly, yeah.

11 THE COURT: Because that comment could be interpreted
12 in many ways. And I suppose it could be interpreted to mean
13 that statements made by Mr. Britt in connection with this
14 litigation now makes sense to him now that he hears what the
15 allegations are, but not that suddenly the light went on and
16 things about which he knew years and years ago --

17 MR. KOERNER: That's true. I think it's a factual
18 question as far as whether or not and what they knew when.

19 THE COURT: I see. So your position is as to the
20 Wavecrest representative they either knew based on the
21 statement you just identified for me, or they should have known
22 because the conduct was such that they should have known.

23 MR. KOERNER: Yes.

24 THE COURT: Okay. Let me understand a little bit more
25 your responses to Ms. Gould's arguments. For example, you

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1 heard Ms. Gould and me talking earlier about number of
2 employees.

3 MR. KOERNER: Just from what Ms. Gould said today,
4 obviously, there is some uncertainty as to at various times how
5 many employees there actually were. So, again, I think that's
6 a factual issue which, she wants to make the motion, she can
7 make the motion.

8 THE COURT: Do you have a view, sir, as to whether the
9 standard that should be used for identifying employees under
10 New York State law is that that's set forth in Title 7 or some
11 other standard?

12 MR. KOERNER: I don't know that. I'd have to do some
13 research on that.

14 THE COURT: Okay. And then on the other claims, what
15 I heard you say earlier, sir, was that your client had very
16 strong recollections of what had happened, whereas Ms. Alderman
17 seemed to recall nothing.

18 MR. KOERNER: That's exactly -- it's outrageous, yeah,
19 what happened.

20 THE COURT: I can't opine on that, sir. But your view
21 is that your client has presented enough to satisfy the various
22 claims that have been brought and that she has not identified
23 or has not basically presented evidence in her deposition
24 testimony or in any of the documents that she has produced that
25 would warrant summary judgment in her favor.

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1 MR. KOERNER: Correct.

2 THE COURT: Okay. Anything else you want to tell me
3 in response to what they're saying?

4 MR. KOERNER: No.

5 THE COURT: All right. This is an unusual
6 circumstance, Ms. Gould, in which I can't tell you that some of
7 your claims have more or less success. Same, Mr. Ettenger,
8 with you -- I don't know. But I do know you wish to make them
9 and, sadly, in my job as judge, I don't get to tell you you
10 can't. The only ability I have is to deny where appropriate
11 and grant where appropriate.

12 So let's then talk. Do I understand the parties would
13 be filing simultaneous motions?

14 MR. ETTENGER: I think the procedure would be we
15 should file our motions on the same day and then give
16 Mr. Koerner an opportunity to oppose both motions and give
17 Ms. Gould an opportunity to oppose my motion on the cross claim
18 on the same day and then all parties should give the same day
19 for reply. Whatever schedule you decide or the parties decide
20 is fine with me.

21 THE COURT: All right. It seems to me -- I don't
22 know. Were you thinking about 30 days or so for your motions?

23 MR. ETTENGER: I think we agreed we were thinking more
24 like 45 and then 20 or 45, 25, and ten, maybe.

25 THE COURT: I am sensitive to the fact that

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1 Mr. Koerner is one man responding to two motions. So whatever
2 time you folks need, if you were going to say 30, I was going
3 to give him 45. If you yourselves are taking 45, maybe 45
4 would be enough. Maybe 60 would be enough. And I don't want a
5 whole lot of time on reply, candidly, but I'm saying he's
6 responding to two motions at once.

7 MR. ETTINGER: Forty, 60, ten?

8 MS. GOULD: Can I respectfully -- this is just my
9 schedule. I have another one sitting on my desk. I would like
10 45 days. And whatever Mr. Koerner wants is fine with me. And
11 reply, in my opinion, my reply is going to be very short.

12 THE COURT: Do you understand, Ms. Gould, that you
13 would be within whatever second period I imposed because you
14 would be responding?

15 MS. GOULD: I do.

16 THE COURT: So you'd be filing three briefs in this
17 matter.

18 MS. GOULD: I get it.

19 THE COURT: Mr. Koerner, does it make sense, if they
20 need 45 days because of their schedules, is 60 enough for you
21 to respond?

22 MR. KOERNER: That's fine.

23 THE COURT: And then I'll give two weeks afterwards.
24 And these are all approximate days. I'm going to look at my
25 calendar and set up a scheduling order.

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1 To the folks at the back table, I can't see a need why
2 you're going to need more than 25 pages for the briefing.

3 So, Mr. Koerner, does it make sense to file one
4 response to both?

5 MR. KOERNER: Probably.

6 THE COURT: So I guess you'll have up to 50, but 40 is
7 better.

8 MR. KOERNER: It's going to be well below 50, I assure
9 you.

10 THE COURT: All right. I will ask the parties, and I
11 am visiting upon you the sins of prior counsel who have
12 appeared before me, please read Rule 56 and local Rule 56.1 and
13 my rules of individual practice. They're annoying, but they're
14 actually quite helpful for me. If you're going to do a Rule
15 56.1 statement, please cite to something and just don't have
16 allegations that are kind of there. And if you're going to
17 respond to it, please keep the same numbering because you'd be
18 amazed at how lesser counsel have responded to these things.
19 It makes it very confusing for me. But I will trust that you
20 all will look at those rules and certainly you'll call out to
21 me if you have they questions.

22 MR. ETTINGER: Your Honor, we do have a significant
23 transcript. I don't want a lot of paper. Should we coordinate
24 the exhibits, one of us files the exhibits rather than you
25 getting two sets of everything?

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1 THE COURT: Yeah, if you can do that.

2 Mr. Koerner, can we let them sort of take the laboring
3 oar on the appendix in this case?

4 MR. KOERNER: Sure.

5 THE COURT: And then that makes the most sense because
6 I don't think you should duplicate efforts. If the parties can
7 speak beforehand and even agree on what exhibits should be
8 included, that would be useful. Also, as you'll see in my
9 rules -- you'll tell me if this isn't there -- it is very
10 helpful for me to have all of the deposition transcripts.

11 MS. GOULD: I thought that was in your rules. Most
12 judges don't want that. I think it's a lot easier. The fact
13 that you want that, we should do it.

14 THE COURT: We actually read them, so, yes.

15 MR. ETTENGER: Thank you, your Honor.

16 THE COURT: Anything else from the parties?

17 MR. ETTENGER: No, your Honor.

18 THE COURT: Thank you. Sorry we kept you guys over.
19 We'll get an order out later today. Please get a copy of the
20 transcript so I can see what we talked about today.

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